Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

HON. MICHAEL L. BENDER, *et al.*,
Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

QUESTIONS PRESENTED

1. Can a simulated judgment, null and void as a matter of state law, nonetheless constitute a "state court judgment" for purposes of the *Rooker-Feldman* doctrine?

2. Is the Bill of Rights and/or Supremacy Clause a waiver of sovereign immunity sufficient to hold the United States Government liable for damages resulting from illegal and/or tortious acts committed by authorized agents and/or those of the State of Colorado pursuant to a theory of respondeat superior?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Tenth Circuit. They are HONS. MICHAEL L. BENDER, NATHAN B. COATS, GREGORY J. HOBBS, JR, REBECCA LOVE KOURLIS, ALEX J. MARTINEZ, MARY J. MULLARKEY, and NANCY E. RICE, in their individual capacities, JOHN DOES 1-99 (whose identities are not known at this time), and THE UNITED STATES OF AMERICA. Tort claims against HON. JOHN W. SUTHERS, and FRIEDRICK C. HAINES were abandoned owing to recent decisions by this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED

OTHER PARTIES TO THE PROCEEDING

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE CASE 15

SUMMARY OF PERTINENT FACTS 17

REASONS WHY THE WRIT SHOULD BE GRANTED 23

I. A Simulated State Court Judgment Void on its Face Cannot Trigger the *Rooker-Feldman* Doctrine 26

II. Article III Is an Absolute Limit on Judicial Discretion 36

III. The Modern Doctrine of Sovereign Immunity Is Judicial Lawmaking 47

CONCLUSION 57

EXHIBITS 62

TABLE OF CASES AND OTHER AUTHORITIES

CASE	PAGE
Alden v. Maine, 527 U.S. 706 (1999)	54
Bill Dreiling Motor Co. v. Ct. of Appeals, 468 P.2d 37 (Colo. 1970)	22
Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996)	45
Bowers v. Hardwick, 478 U.S. 186 (1986)	56
Bradley v. Fisher, 80 U.S. 335 (1871)	19, 29
Brown v. Allen, 344 U.S. 443 (1953)	31
Caperton v. A. T. Massey Coal Co., No. 08-22 (U.S. Jun. 9, 2009)	23
Carey v. Piphus, 435 U.S. 247 (1978)	15, 36
Chambers v. Baltimore & O. R. Co., 207 U.S. 142 (1907)	37
Claflin v. Houseman, 93 U.S. 130 (1876)	various
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)	46
Davidson Chevrolet v. City and County of Denver, 330 P.2d 1116 (Colo. 1958)	23, 27
Denver County Court v. Lee, 439 P.2d 737 (Colo. 1968)	20
Diblasio v. Novello, 344 F.3d 292 (2d Cir. 2003)	21
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	31

CASE	PAGE
Dodge v. Cotter Corp., 203 F.3d 1190 (10th Cir. 2000)	31
E.J.R. v. District Court, 892 P.2d 222 (Colo. 1995)	23
Erbaugh v. People, 140 P. 188 (Colo. 1914)	23
Erickson v. Pardus, No. 06–7317, 551 U. S. ____ (2007)	15
Ex parte McCardle, 74 U.S. 506 (1869)	22
Exxon-Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005)	27
Friesen v. People ex rel. Fletcher, 192 P.2d 430 (Colo. 1948)	20
Hans v. Louisiana, 134 U.S. 1 (1890)	45, 53
Harcourt v. Fox [1692], 1 Show. 426 (K.B.)	38
Harrington v. Wilson, No. 05-cv-01858-EWN-MJW (D.Colo. Sept. 21, 2005)	46
Head Money Cases, 112 U.S. 580 (1884)	56
In re Constitutionality of Court of Appeals, 26 P. 214 (Colo. 1890)	20
Johnson v. Rodrigues, 226 F.3d 1103 (10th Cir. 2000)	34
Kamper v. Hawkins, 3 Va. 19 (Va. 1793)	various
Kenmen Eng'g v. City of Union, 314 F.3d 468 (10th Cir. 2002)	32, 33
Kobler v Austrian Republic [2003] 3 CMLR 28	55
Lance v. Dennis, No. 05-555, 546 U.S. ___ (2006)	34

CASE **PAGE**

Lynk v. LaPorte Superior Ct. No. 2,
789 F.2d 554 (7th Cir. 1986) 34
Maharaj v Attorney-General of Trinidad & Tobago (No. 2) [1979] AC 385 55
Marbury v. Madison, 5 U.S. 137 (1804) . . . . various
Moragne v. States Marine Lines,
398 U.S. 375 (1970) 36
Mosk v. Superior Court of Los Angeles,
601 P.2d 1030 (Calif. 1979) 24
Nwosun v. General Mills Rests., Inc.,
124 F.3d 1255 (10th Cir. 1997) 31
People v. Carter, 527 P.2d 875 (Colo. 1974) . 20
People ex rel. Burke v. District Court,
152 P. 149, 152 (Colo. 1915) 24
People ex rel. City of Aurora v. Smith,
424 P.2d 772 (Colo. 1967) 19
Pierson v. Ray, 386 U.S. 547 (1967) 46
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 56
Ricci v. DeStefano,
No. 07-1428, 557 U.S. ___ (2009) 57
Scott v. Sandford, 60 U.S. 393 (1857) 43
Smith v. Bender,
No. 09-1003 (10th Cir. Sept. 11, 2009) 31
Smith v. Bender,
No. 07-cv-1924-MSK-KMT (Jul. 11, 2008) . . 33

CASE	PAGE
Smith v. Mullarkey, 67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003)	30, 35
Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005) (per curiam)	18
Smith v. Thomas, No. 09-cv-1926-JDB (filed Oct. 3, 2009)	25, 27
Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977)	53
Stanford v. Kentucky, 492 U.S. 361 (1989)	56
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	46
State Oil Co. v. Khan, 522 U. S. 3 (1997)	25, 46
Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)	33
Stump v. Sparkman, 435 U.S. 349 (1978)	49, 53
Sullivan v. McDonald, 913 A.2d 403 (Conn. 2007)	24
Turney v. Ohio, 273 U.S. 510, 523 (1927)	various
United States v. Bajakajian, 524 U.S. 321(1998)	36
United States v. Stanley, 483 U.S. 669 (1987)	49
United States v. Will, 449 U.S. 200 (1980)	24
United States v. Wilson, 32 U.S. 150 (1833)	37
Weinberger v. Rossi, 456 U.S. 25, 32 (1982)	56
Wood v. Orange County, 715 F.2d 1542 (11th Cir. 1983)	34

STATUTES AND OTHER AUTHORITIES

	PAGE
28 U.S.C. § 1254(1)	25
28 U.S.C. § 1654	20
42 U.S.C. § 1983	passim.
Colo. Const. art. 6, § 2(1)	20
Colo. Const. art. 6, § 3	20
Colo. Const. art. 6, § 9(1)	20
Colo. Const., art. 6, § 21	20
Colo. Rev. Stat. § 13-4-101	23
Colo. Rev. Stat. § 13-4-102(1)	21
Colo. Rev. Stat. § 13-4-110(1)(a)	22
Colo. Rev. Stat. § 16-6-201(2)	23, 24
Mass. Const. (1780), Preamble	15
Mass. Const. (1780), Part I, art. V	52
U.S. Const. art. VI, cl. 2.	28
U.S. Const. art. III, § 1	37
Virginia Declaration of Rights (Va. 1776)	52
The Declaration of Independence (U.S. 1776)	25, 48

A Conversation with Justice Clarence Thomas, 36 *Imprimis* Vol. 10 (Oct. 2007)	45
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PAGE

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International Covenant on Civil and Political Rights (1966) 55

Jefferson, Thomas,

– Letter (to William C. Jarvis), 1820 43

– Letter (to William Nicholas), 1825 47

– Letter (to Spencer Roane), 1819 44

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Magna Carta c. 61 (1215) 50

Matthew 7:12 48

PAGE

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Proclamation of the General Court (Mass. 1776) 52

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Vienna Convention on the Law of Treaties (1980) 56

OPINIONS BELOW

A copy of the published opinion of the Court of Appeals for the Tenth Circuit, *Smith v. Bender*, No. 09-1003 (10th Cir. Sept. 11, 2009) (unpublished), is included in the Appendix to this Petition at p. 62. A copy of the decision entered in the United States District Court for the District of Colorado on July 11, 2008 is at p. 77.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1). Smith's timely-filed petition for rehearing en banc was denied on November 3, 2009; this petition is considered timely filed when mailed on or before February 1, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

> which shall not be diminished during their Continuance in Office.

Article III, Section 2, of the United States Constitution provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Preamble to the Bill of Rights provides, in pertinent part:

> THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides in relevant part: "... nor shall any person be ... deprived of life, liberty, or property, without due process of law; ...."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2(1) of Article 6 of the Colorado Constitution provides: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."

Section 9(1) of Article 6 of the Colorado Consti-

tution provides in pertinent part: "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein."

STATUTES INVOLVED

Colorado Revised Statute § 13-4-101 provides, in pertinent part: "Judges of the court of appeals may serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court."

Colorado Revised Statute § 13-4-102(1) provides, in pertinent part: "Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts...."

Colorado Revised Statute § 13-4-110(1)(a) provides:

> When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a

summary manner, and its determination shall be conclusive.

Colorado Revised Statute § 16-6-201 provides, in pertinent part:

(1) A judge of a court of record shall be disqualified to hear or try a case if: [...]

(d) He is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

STATEMENT OF THE CASE

The essence of Smith's grievance is that judges who are properly named as defendants in tort sat in judgment of their own cause, in open defiance of this Court's hide-bound pronouncement to the contrary. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

Smith filed a tort action in federal district court under *Carey v. Piphus*, 435 U.S. 247 (1978), which only required him to prove that he had a federal right (here, to have grievances decided by a fair and independent tribunal, and equal protection of the law), and that he did not get it. The lower courts invoked the *Rooker-Feldman* doctrine to dismiss it, despite the fact that the legality of the act complained of had never been decided in a court of law. Thus, the matter could properly be disposed of in a *per curiam* decision, as the law is clearly established, and the lower courts are in open defiance of it. *See e.g., Erickson v. Pardus*, No. 06–7317, 551 U. S. ____ (2007).

By its very nature, a constitution creates a series of adhesion contracts, commonly referred to as "citizenship" and "statehood." *See*, Mass. Const. (1780), Preamble. Defendant United States has a contractual duty to Smith to furnish "the protection of the laws whenever he receives an injury," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), and is currently in breach of its obligation. Accordingly,

if this Court extends absolute judicial immunity to agents of the vassal kingdom of Colorado, it must assume liability in *respondeat superior* as suzerain for damages caused thereby, under any theory of sovereignty embraced by our Framers.

SUMMARY OF THE ARGUMENT

The essence of this case was captured by the late Charles Schulz:

I GUESS IF YOU HAVE A SIGNED DOCUMENT IN YOUR POSSESSION, YOU CAN'T GO WRONG. THIS YEAR I'M REALLY GOING TO KICK THAT FOOTBALL!
AAUGH!

The *signed document*, of course, is the Constitution. It is the source of this Court's authority and thus, beyond its ability to re-write *sua sponte*. *See, Kamper v. Hawkins*, 3 Va. 19 (Va. 1793) (state-law precursor); *Marbury v. Madison, supra*.

"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Id.* As such,

if the Government acts by and through its agents and causes injury through an unauthorized act, it must either assume responsibility for the damage, or allow its agents to be sued. To hold otherwise is to confess that we are no longer a nation of laws.

This Court hears eighty cases per year, under a presumption that it has to make certain that it gets every one of them just right, because every other court in the land -- and every citizen -- is relying on it for guidance. But if this Court is no longer willing to insist that our lower courts follow its dictates, its Herculean efforts are a staggering waste of your time (and our money). But more to the point, if we as citizens can no longer reasonably rely on its pronouncements as an authoritative statement of what "the law" is, there is no "law" left to preserve.

The threshold question in this case is whether a decision entered by a state supreme court which is void on its face as a matter of state law can be a "final state-court judgment" for purposes of the *Rooker-Feldman* doctrine. If the answer is no, the decision below constitutes plain error, and ought to be reversed. But if the answer is yes, this constitutes a fundamental breach of the contract of citizenship, giving rise to an action sounding in either contract, tort, or both. And this, in turn, raises the issue of sovereign immunity.

While it is inherent in the nature of a sovereign not to be amenable to suit by an individual without his consent, the King of England always gave his consent whenever justice required. Under our law, **the Bill of Rights and Fourteenth Amendment necessarily constitute express consent, for without it, the Bill of Rights becomes a bill of goods.**

No sane man would ever consent to adoption of a constitution that empowered his government to spike his coffee with LSD *as an experiment*, with absolute impunity. Sovereign immunity must have limits, and they are defined by the Bill of Rights.

SUMMARY OF PERTINENT FACTS

Despite the fact that they were defendants in tort and admitted the conflict, the natural Defendants in this case entered a 'decision' in the case of *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam). As this was a flagrant violation of his Fourteenth Amendment right to have grievances heard by a fair and independent tribunal, *Turney v. Ohio*, *supra*, Smith filed a Section 1983 action in federal district court, naming the United States as a contingent defendant on the grounds that it is ultimately responsible for the quality of justice dispensed in our Nation's courts.

The dispositive fact in this case is that the natural Defendants made not one, but two decisions. The first was the decision on August 18, 2005 as to whether Smith's appeal of the state district court decision was to be heard in the state's Court of Appeals or Supreme Court. But while that court had jurisdiction over the question as a matter of statutory law, the justices were required by law to recuse themselves. As their decision to take the case was void as a matter of Colorado law, any decision they rendered was done without colorable jurisdiction.

The legal significance of this is that it deprives the natural Defendants of the obvious benefits of absolute judicial immunity. *See, Bradley v. Fisher*, 80 U.S. 335, 352-53 (1871) (where judge lacks jurisdiction to rule, "no excuse is permissible.").

A. The Colorado Supreme Court's Actions

1. The Colorado Supreme Court Is a Court of Limited Jurisdiction, the Scope of Which Is Drawn Narrowly By the State Constitution.

The framers of the Colorado constitution took pains to limit the reach of the state supreme court, which were always respected. That court cannot expand its own jurisdiction by rule. *People ex rel. City of Aurora v. Smith*, 424 P.2d 772 (Colo. 1967). The state legislature cannot expand the supreme

court's original jurisdiction beyond limits expressly set forth in the state constitution, *People v. Carter*, 527 P.2d 875 (Colo. 1974), but can take it away, *Denver County Court v. Lee*, 439 P.2d 737 (Colo. 1968), provided they don't eliminate their power to perform final reviews. *In re Constitutionality of Court of Appeals*, 26 P. 214 (Colo. 1890).

The Colorado constitution explicitly designated its district courts as courts of "general jurisdiction," Colo. Const. art. 6, § 9(1), and "[t]he [Colorado] supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only."[1] Id. art. 6, § 2(1). Also, "[i]t is likewise clear from these provisions that the jurisdiction of both courts being created by the Constitution, the jurisdiction of each was necessarily excluded from the other." *Friesen v. People ex rel. Fletcher*, 192 P.2d 430, 432 (Colo. 1948).

2. Background History of the Case

Smith filed a lawsuit against the justices of the Colorado Supreme Court alleging an array of due

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[1] The Colorado Supreme Court enjoys original jurisdiction to issue extraordinary writs/ Colo. Const. art. 6, § 3. It may write court procedural and administrative rules. Id., § 21 exercise "general superintending control over all inferior courts," Id., § 2(1), and give advisory opinions to the executive and legislative branches when asked. Id., § 3.

process and Americans With Disabilities Act violations in Denver District Court under a theory of law that was successful under legally indistinguishable facts in the Second Circuit. *Diblasio v. Novello*, 344 F.3d 292 (2d Cir. 2003). He also raised facial challenges, grounded in federal law, to the constitutionality of the Colorado bar admission statute. As federal civil rights claims may be decided in state courts of general jurisdiction, *Claflin v. Houseman*, 93 U.S. 130 (1876), Smith had a clear legal right to be heard in that court. Yet, inventing a state-law *Rooker-Feldman* doctrine in a court of general jurisdiction, the trial court judge held that he did not have jurisdiction to hear Smith's claims. Naturally, he appealed.

3. Judicial *Legerdemain*

Colo. Rev. Stat. § 13-4-102(1) provides, in pertinent part, that "[a]ny provision of law to the contrary notwithstanding,[2] the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts." As such, Smith's appeal was properly within the jurisdiction of the Colorado Court of Appeals.

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[2] Statutory exceptions are narrow, involving such obscure matters as water law and, actions of the state public utilities commission. Colo. Rev. Stat. § 13-4-102(1)(a)-(h).

Statutory mandates notwithstanding, the Court of Appeals tried to divest itself of jurisdiction, invoking Colo. Rev. Stat. § 13-4-110(1)(a), providing the Supreme Court legal authority to summarily determine jurisdiction. Complaint, *Smith v. Bender* [Dkt. #1], No. 07-cv-01924-DME-KMT (D.Colo. filed Sept. 11, 2007) at 6 (facts judicially noticed by the trial court). But while the state supreme court gained jurisdiction to decide the question, it did not have an unfettered discretion, for "absent constitutional authority, it is equally clear that [it] cannot adopt a rule which changes jurisdiction of a court contrary to a provision of a statute," *Bill Dreiling Motor Co. v. Court of Appeals*, 468 P.2d 37, 41 (Colo. 1970). Moreover, on account of their conflicts of interest, the natural Defendants were precluded as a matter of Colorado statutory law from acting in their official capacities in connection with that question.

4. A Judge Cannot Decide A Matter Without Jurisdiction.

"Without jurisdiction, the court cannot proceed at all in any cause, *Ex parte McCardle*, 74 U.S. 506, 514 (1869), and a judge with a personal financial interest in a case cannot exercise jurisdiction over it. Last Term, this Court declared that

> the Due Process Clause incorporated the

> common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

Caperton v. A. T. Massey Coal Co., No. 08-22 (U.S. Jun. 9, 2009) (slip op. at 6) (quoting *Tumey, supra*).

Colorado law goes even further, imposing an affirmative obligation upon judges to recuse: "Any judge who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." *Colo. Rev. Stat. § 16-6-201(2)*. Once that judge is obligated to recuse himself, he immediately loses all jurisdiction in the matter except to transfer the case. *Erbaugh v. People*, 140 P. 188, 190 (Colo. 1914)). Further, a judgment rendered in the face of a jurisdictional defect is void. *Davidson Chevrolet v. City and County of Denver*, 330 P.2d 1116 (Colo. 1958).

Judges of the Colorado Court of Appeals may "serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court." *Colo. Rev. Stat. § 13-4-101*. In every jurisdiction with a similar statutory provision, conflicted supreme court jus-

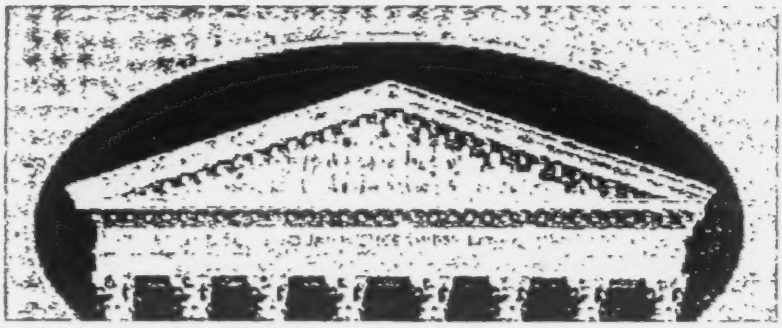
tices are required to recuse. *E.g., Mosk v. Superior Court of Los Angeles*, 601 P.2d 1030 (Calif. 1979) (collecting cases); *Sullivan v. McDonald*, 913 A.2d 403 (Conn. 2007). As the "Rule of Necessity" only applies in cases of bona fide necessity, *see United States v. Will*, 449 U.S. 200, 214 (1980), and sixteen non-conflicted judges were available and authorized by statute to hear it, it cannot trump Smith's right to have his grievances decided by a fair and independent tribunal.

The Colorado legislature also took great pains to ensure that judges could not abuse their high office for personal benefit. A judge "who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." Colo. Rev. Stat. § 16-6-201(2). And once a judge is obligated to recuse, s/he "immediately loses all jurisdiction in the matter [except transfer it to another judge]." *People ex rel. Burke v. District Court*, 152 P. 149, 152 (Colo. 1915) (quotation omitted).

B. The Unavoidable Legal Implications

As the natural Defendants could not even gain jurisdiction over said case as a matter of law, their actions are extra judicial and void. Their decision is not a final state court judgment under Colorado law; they can lay no claim to judicial immunity. *Bradley v. Fisher, supra.*

REASONS WHY THE WRIT SHOULD BE GRANTED



This is the essence of the bargain of American citizenship: That "all men are created equal," *The Declaration of Independence* ¶ 2 (U.S. 1776), and entitled to equality before the law.

For this reason, this Court has a duty to ensure that lower court judges may not defy its dictates. *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997). Smith maintains that this Court has the duty to exercise the judicial power, and that it cannot lawfully be impaired by Congress in a manner eviscerating the Bill of Rights and the equal justice under law it affords. Accordingly, 28 U.S.C. § 1254(1) is unconstitutional, to the extent that it gives this Court any discretion as to whether it is to correct plain error at the lower court level; Smith is litigating that issue in the courts of the District of Columbia. *See, Smith v. Thomas*, No. 09-cv-1926-JDB (filed Oct. 3, 2009).

While this matter could easily be disposed of in

a *per curiam* opinion, there is no recognized legal mechanism by which this Court can be required to act. But if it does nothing, it does nothing *as an authorized agent* of Defendant United States. By ratifying the patently illegal acts of a political subdivision it created, it assumes liability sounding in contract and/or tort under a theory of *respondeat superior*. Accordingly, Smith mounts a direct challenge to the modern doctrine of sovereign immunity, on the grounds that it is an act of judicial lawmaking forbidden by Article III.

Sovereign immunity is an odious doctrine, one which has been eschewed by the civilized world. Three Justices are on record opposing it, three are on record in favor of it, and three have yet to be heard from. As the better 'originalist' argument is against the doctrine, and the prevailing view has never mustered more than a threadbare majority on the Court, this is a question ripe for reconsideration.

I. A STATE COURT JUDGMENT VOID ON ITS FACE CANNOT PROPERLY TRIGGER APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine applies only to "limited circumstances" where "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking

review and rejection of that judgment." *Exxon-Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). Accordingly, proper application of the rule necessarily presupposes the existence of a final state court judgment.

For the reasons explained in detail above, the ersatz decision rendered in *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam) was void on its face as a matter of Colorado law. As such, it is a nullity. The Colorado Supreme Court explains:

> A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it. ... A judgment entered where such defect exists has neither life nor incipience, and a court is impuissant to invest it with even a fleeting spark of vitality, but can only determine it to be what it is – a nothing, a nullity. Being naught, it may be attacked directly or collaterally at any time.

Davidson Chevrolet, 330 P.2d at 1118-19 (citation omitted); *see, E.J.R. v. District Court*, 892 P.2d 222 (Colo. 1995) (explaining distinction between void and voidable judgments).

This, in turn, begs an obvious question: **How can a simulated judgment which has no legal force as a matter of Colorado law qualify as a "state court**

judgment" for purposes of the *Rooker-Feldman* doctrine? Neither the trial court nor the appellate court even acknowledged this obvious question -- to say nothing of addressing it. Smith submits that the explanation for the local federal courts' willful refusal to address it is equally obvious.

A. On Courtroom Corruption

> It is widely known that many state court judges and some lower court judges play favorites among litigants and lawyers. Roy Cohn once famously quipped, "I don't care if my opponent knows the law, as long as I know the judge." ... I have seen it with my own eyes in the courts of Boston, New York, and elsewhere.

Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* 116 (Oxford U. Press, 2001). Judicial corruption is ubiquitous, from Albania to Zaire; to deny the facts is illogical. And if you know what to look for, says notable human rights activist Geoffrey Robertson, it is easy to spot, if you know what to look for:

> Bribes are facilitated by lawyers, court clerks and police, who take their cut on behalf of clients who do not complain when they win their case, are acquitted or released on bail as a result. Judges who are political lickspit-

> tles, ruling in favour of the state, police or army because they wish for favours, promotion or post-retirement appointments, **can usually dress up their wrong decisions with bogus legal arguments or manipulate the facts to support their findings.**

Geoffrey Robertson, Q.C., The Media and Judicial Corruption, in Transparency Int'l., *The 2007 Global Corruption Report*, 109 (Cambridge U. Press 2007) (emphasis added). And it is not confined to Third World toilets. As Monroe Freedman observes:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about **judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.**

Monroe Freedman, Speech (to The Seventh Annual Judicial Conference of the United States Ct. of Appeals for the Federal Circuit) (May 24, 1989), as reprinted in 128 F.R.D. 409, 439 (1989).

B. The Tenth Circuit Makes the World Wrestling Federation Look Credible By Comparison.

1. When Article III Judges Can't Get First-Year Civil Procedure Right, You Know Something Is Amiss.

The decision below is a veritable monument to outcome-based jurisprudence. It is difficult to find a single opinion where so many basic rules of law were mangled beyond recognition:

> In order to fully address the issues raised by Mr. Smith in this appeal, however, we also point out the following fallacies in his arguments. First, to the extent Mr. Smith is seeking to relitigate his federal-law challenges to the Colorado Supreme Court's denial of his admission to the bar of the State of Colorado, those challenges are barred by the doctrines of res judicata and collateral estoppel by virtue of: (1) this court's final decision in Mr. Smith's prior appeal to this court, see Smith v. Mullarkey, 67 F. App'x 535, 538 (10th Cir. 2003) (applying Rooker-Feldman doctrine and holding that district court correctly determined that it did not have subject matter jurisdiction over Mr. Smith's federal-law claims challenging the denial of his admission to the Colorado bar); and (2) the fact that the United States

> Supreme Court denied Mr. Smith's petition for a writ of mandamus and/or prohibition pertaining to that final decision, see In re Smith, 540 U.S. 1103 (2004).

Smith v. Bender, No. 09-1003 (10th Cir. Sept. 11, 2009) (unpublished), slip op. at 5-6.

As Article III judges are generally regarded as being among the best in the world, that passage is shocking. Anyone even vaguely familiar with the *Rooker-Feldman* doctrine would know that it cannot be invoked to defeat claims for prospective relief. *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983). Anyone even vaguely familiar with operation of this Court would know that the denial of certiorari is not a review on the merits. *Brown v. Allen*, 344 U.S. 443, 489-97 (1953) (opinion of Frankfurter, J., stating the position of a majority of the Court). Anyone vaguely familiar with *res judicata* would know that it only applies to a decision of a competent court on the merits. *Nwosun v. General Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (preconditions for *res judicata*). Finally, anyone even vaguely familiar with the doctrine of collateral estoppel knows that it only applies against a party who had a full and fair opportunity to litigate the issue. *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000).

The Panel wasn't simply content with mangling precedent. Even in his original lawsuit, Smith took care to only raise issues that, based on the precedents of this Court and the Tenth Circuit, would lie safely outside the maw of *Rooker-Feldman*. In this case, the justices violated his well-established federal right to have federal civil rights claims and/or facial challenges to a statute grounded in federal law heard in a state court of general jurisdiction. *Claflin*, supra. This constitutes an "independent claim" which, even in the Tenth Circuit, has always been outside the ambit of *Rooker-Feldman*. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479-80 (10th Cir. 2002). **In essence, the Panel falsified the facts of the case.**

2. "*That's Some Catch, That Catch-22*."[3]

In a gambit worthy of Heller, the Panel does a procedural pirouette, tacitly acknowledging that Smith had a winning argument, while deftly avoiding determination of it:

> Mr. Smith claims that, in *Smith v. Mullarkey*, the Justices of the Colorado Supreme Court "violated his well-established federal right to have [his] federal civil rights claims and/or facial challenges to a [state] statute

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[3] Joseph Heller, *Catch-22*, 46 (Simon & Schuster, 1961).

> grounded in federal law decided in a state court of general jurisdiction." Aplt. Opening Br. At 15 (citing *Claflin v. Houseman*, 93 U.S. 130 (1876)). Mr. Smith further argues that "[t]his constitutes an 'independent claim,' which has always been outside the ambit of the *Rooker-Feldman* doctrine." *Id.* (citing *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479-80 (10th Cir. 2002)).

Smith v. Bender, slip op. at 7.

Again, the paw-prints of "outcome-based jurisprudence" are unmistakable. The Panel "forgot" that a federal court may not accept hypothetical jurisdiction over an issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). **Smith couldn't reach the substantive issue, as the case had been dismissed on jurisdictional grounds**. *Smith v. Bender*, No. 07-cv-1924-MSK-KMT (Jul. 11, 2008). On the one hand, if he argues the point, it is frivolous, and he opens himself to sanctions ... but on the other, if he doesn't, the Panel invokes hypothetical jurisdiction and deems it to be abandoned.

"That's some catch, that Catch-22."

2. The Tenth Circuit Has Always Used the *Rooker-Feldman* Doctrine As a Tool of Oppression.

The *Rooker-Feldman* doctrine "has produced nothing but mischief for 23 years." *Lance v. Dennis*, No. 05-555, 546 U.S. ___ (2006) (Stevens, J., dissenting, slip op. at 2). While it is innocuous if kept within the narrow bounds this Court has set for it, the Tenth Circuit transformed it into a Disneyland of despotism.

Officially, the Tenth Circuit "is convinced that the *Rooker-Feldman* doctrine does not bar a federal action when the plaintiff ... lacked a reasonable opportunity to litigate claims in state court." *Johnson v. Rodrigues*, 226 F.3d 1103, 1110 (10th Cir. 2000). This exception ensures that a state cannot block access to federal court by refusing to allow issues to be raised in state courts. *Lynk v. LaPorte Superior Ct. No. 2*, 789 F.2d 554, 564 (7th Cir. 1986). Without this exception, *Rooker-Feldman* would be unconstitutional, since it would have the effect of depriving plaintiffs "of any forum, state or federal, where [they have] a reasonable opportunity to present" their federal constitutional claims. *Wood v. Orange County*, 715 F.2d 1542 (11th Cir. 1983).

In the real world, the Tenth Circuit's use of the *Rooker-Feldman* doctrine is invariably outcome-based, as exemplified here:

> [Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**

Smith v. Mullarkey, 67 F.App'x. at 535, slip op. at 4 (unpublished; emphasis added).

In this case, judicial analysis is so simple, a caveman could do it: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a lower federal court must hear his claim under Feldman). Condition X is true (a fact the Tenth Circuit panel openly admitted in the highlighted text). Therefore, Y (a lower federal court must hear that claim).

This is what Smith refers to as "designer law": an unpublished decision, affecting one and only one set of litigants, in open and notorious defiance of the binding precedent of this Court. It is a naked act of sheer judicial will, far beyond the legitimate contours of the Article III judicial power.

II. ARTICLE III IS AN ABSOLUTE LIMIT ON JUDICIAL DISCRETION.

Where rights begin, your discretion ends: The proper boundaries of the Article III judicial power are defined by the rights that constrain them. A judge may not write laws, as that is the province of the legislative branch. *The Federalist No. 78.* A lower court judge may not defy the dictates of a superior court within its jurisdiction. *State Oil Co. v. Khan*, 522 U.S. at 20. And, more importantly for purposes of this case, the Article III judicial power is necessarily constrained by rights retained by the people under the Bill of Rights, whether they are enumerated or not.

A. Procedural Rights Preserve Natural Rights.

This Court has declared that as American citizens, we are entitled to equality before the law, *United States v. Bajakajian*, 524 U.S. 321, 338 (1998) (quoting dissent by Kennedy, J., *id.* at 353, establishing an unanimous agreement on this point), to procedural due process, *Carey, supra*, to have grievances heard by a fair and independent tribunal, *Tumey, supra*, to be able to rely upon the pronouncements of this Court as an authoritative exposition of what "the law" is, *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970), and to an effective remedy when those rights are wrongfully invaded. *Marbury v. Madison, supra.* These are

rights emanating from the contract of citizenship, and essential to securing the benefits thereof. As Justice Moody famously observed, "[t]he right to sue and defend in the courts is the alternative of force ... the right conservative of all other rights." *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907).

B. Article III Defines the Judicial Power Narrowly and Precisely.

Article III judges are the only American officials who enjoy a freehold in office; this freehold is conditioned on the maintenance of so-called "good Behaviour" in office. U.S. Const. art. III, § 1. In the course of debate at the Virginia Ratification Convention, James Madison asserted that "where a technical word is used, all the incidents belonging to it necessarily attended it." 3 Elliot, *Debates on the Federal Constitution* 531 (1836). This view was invoked by Judge Pendleton, John Marshall, and Edmund Randolph in subsequent debate. *Id.* at 546, 558-9, 573. If it was unnecessary for the Framers to re-define technical words such as "pardon," *United States v. Wilson*, 32 U.S. 150 (1833), it follows that "good behavior" is defined by English law.

While the King could do no wrong, his courtiers often did. As such, the common law developed a remarkably effective system for policing officials who abused the powers of the magistracy. If the

government owed you a duty, you had a remedy in mandamus. If you were victim of a crime, you prosecuted the perpetrators yourself. If you were wrongfully imprisoned, you were entitled to challenge your imprisonment through a writ of habeas corpus. And if a public official who had life tenure abused his authority, you could remove him from office through a writ of *scire facias*.

Although most agents of the Crown served "at the pleasure of the King," many officials received a freehold in their offices, conditioned on "good behavior." *See e.g.*, 4 E. Coke, *Inst. of the Laws of England* 117 (re: Baron of the Exchequer). Lesser lords were given the authority to bestow freeholds, creating a multi-tiered political patronage system where everyone from paymasters to parish clerks enjoyed job security. *See, Harcourt v. Fox* [1692], 1 Show. 426 (K.B.) (clerk of the peace).

At common law, the good behavior tenure of officeholders was originally enforced by the sovereign through the writ of *scire facias*. But as this power concerned only the interests of his subjects, and the King exercised it only *in parens patriae*, he was bound by law to allow the use of it to any subject interested. Blackstone explains:

> WHERE the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, or where the patentee hath

> done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of scire facias in chancery. This may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a scire facias.

3 William Blackstone, *Commentaries on the Laws of England* 260-61 (1765).

By making an officeholder subject to removal for violating it, the condition of "good behavior" defined the powers of a given office. Sir Edward Coke listed three grounds for the forfeiture of that tenure: abuse of office, nonuse of office, and willful refusal to exercise an office. Saikrishna Prakash and Steve D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72, 90 (2006) (citing Coke's *Institutes*). Blackstone added that "the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office [could be prosecuted] either by impeachment in parliament, or by information in the court of king's bench." 4 Blackstone, *Commentaries* at 140-41. Thus, by implication, the duty to be fair and impartial was an integral part of the 18th Century English judge's job description.

More critically for purposes of this dispute, the "abuse of office" condition seriously curtails the judge's freedom of action. The Framers of our Constitution envisioned judges as interpreters of the law, as opposed to (self-appointed) authors. Alexander Hamilton explained that to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." The Federalist No. 78 at 442 (A. Hamilton) (Isaac Kramnick ed., 1987). Blackstone asserted that a judge's duty to follow precedent was derived from the very nature of the judicial power itself: a judge is "sworn to determine, not according to his own judgments, but according to the known laws." 1 Blackstone, *Commentaries* at 69. A century earlier, Coke wrote that "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." 1 E. Coke, *Institutes* at 51. As in all but the most exotic cases, the law has been established, a judge was seen as little more than an administrator, playing what Professor Llewellyn wryly called "the game of matching cases." Karl Llewellyn, *The Bramble Bush* 49 (1960). As such, a judge's willful refusal to faithfully apply established law in a dispute violated his good behavior tenure, constituting valid grounds for removal.

C. The Framers Never Intended To Give Federal Judges the Despotic Powers They Arrogated To Themselves.

A. In some countries a single man makes the laws according to his own pleasure.
Q. What is such a government called?
A. A *Despotism*, or absolute monarchy: and the person who thus rules is a Despot, or absolute monarch.

Arthur J. Stansbury, *Elementary Catechism On the Constitution of the United States* 18-19 (Hilliard, Gray, 1828) (italics in original).

In America, we call him a federal judge.

1. Under the Framers' Constitution, a Judge Was More Father-Confessor Than Black-Robed Despot.

In the *Federalist*, Alexander Hamilton referred to the federal judiciary as the "weakest" branch, The Federalist No. 78 at 437, with good cause: the colonial judge could scarcely blow his nose without a note from the jury foreman, signed in triplicate. The ultimate power to decide both fact AND law resided with the jury; the trial judge was mainly an administrator, and source of objective counsel on the state of the law for the jurors:

> [In] 1793 John Jay, sitting as chief justice of the United States, informed a civil jury that while the court usually determined the law and the jury found the facts, the jury nevertheless had "a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." "[B]oth objects," Jay concluded, "are lawfully, within your power of decision."

"The Jury and Consensus Government in Mid-Eighteenth-Century America", William E. Nelson, article in *The Bill of Rights: Original Meaning and Current Understanding* (ed. E. W. Hickok, Jr., Univ. Press of Va. 1991, reprinted at http://www.constitution.org/jury/pj/nelson.htm (unpaginated).

In law school, students are taught that *Marbury v. Madison* was *sui generis*. Its precursor is *Kamper v. Hawkins, supra*, a 1793 Virginia case interpreting that state's constitution. It was presided over by such notables as Spencer Roane and St. George Tucker, whose seminal treatise on Blackstone translated the English common law for domestic use. It was Tucker's view that a judge should not stray beyond the narrowly-circumscribed bounds of his office:

> If the principles of our government have established the judiciary as a barrier against the possible usurpation, or abuse of power

> in the other departments, how easily may that principle be evaded by converting our courts into legislative, instead of constitutional tribunals?
>
> To preserve this principle in its full vigour, it is necessary that the constitutional courts should all be restrained within those limits which the constitution itself seems to have assigned to them respectively.

Kamper v. Hawkins, 3 Va. at 88 (opinion of Tucker, J., seriatim). Judge Tucker apprehended the danger, as did Judge Tyler, who declared that "I will not in an extra-judicial manner assume the right to negative a law, for this would be as dangerous as the example before us." *Id.* at 61 (opinion of Tyler, J., seriatim). And in the wake of *Marbury v. Madison*, Thomas Jefferson warned that to anoint judges as ultimate arbiters of constitutional questions was "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." Thomas Jefferson, *Letter* (to William C. Jarvis), Sept. 28, 1820, at 1.

While the Marbury Court claimed the nominal right to judicial review, in the first four-score years of our Republic, it never exercised it, ending with *Scott v. Sandford*, 60 U.S. 393 (1857) (invalidating the Missouri Compromise). In fact, it really was the *weakest* branch.

2. *Boni Judicis est Ampliare Jurisdictionem*

It is the part of a good judge, the maxim goes, to expand his jurisdiction. The American judiciary has taken that maxim to heart, as the short history of American jurisprudence is judges, grasping for power. The overpowering role of the modern federal judiciary would have surprised Hamilton and mortified Jefferson; in later letters, he repeatedly warned recipients of the storm that was to come. "The constitution ... is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." Thomas Jefferson, *Letter* (to Spencer Roane), Sept. 6, 1819 at 1.

More to the point, our imperious judiciary has written a "constitution" no sentient human being would ever voluntarily consent to. It declares – with scarcely even a whiff of subtlety -- that the former Republic once known as the United States of America is a *regime*, governed by a "judicial oligarchy," Robert H. Bork, Our Judicial Oligarchy, *First Things* 67 (Nov. 1996) at 21, brought about by what he accurately described as a "judicial coup d'êtat." R. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (New York: AEI Press, 2003), at 13.

No less an authority than Justice Thomas concurs, in noting that the structure of our Constitution and Bill of Rights was the most certain protector of our rights as individuals:

> [I]t was the structure of the government that was supposed to protect our liberty. And what has happened through the years is that the protections afforded by that structure have been dissipated. So my opinions are often about the undermining of those structural protections.

A Conversation with Justice Clarence Thomas, 36 *Imprimis* Vol. 10 (Oct. 2007) at 6.

As Judge Tucker and Jefferson both observed, the most important structural protection of liberty was the separation of powers. Courts could only "declare the sense of the law; [for] if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78 at 440 (A. Hamilton). Modern judges have utterly obliterated that prudential restraint, re-writing the Constitution at will, effectively "designing a Constitution for a country I do not recognize." *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

As a practical matter, the modern judge only follows so-called *binding* precedent when it takes him right where he wanted to go in the first place. Even the plain words of the Eleventh Amendment fell to the "judicial veto" in *Hans v. Louisiana*, 134

U.S. 1 (1890). John Paul Stevens, "Two Questions About Justice," 2003 Ill. L. Rev. 821, 824.[4] Still, the most egregious example of judicial usurpation in history might be *Pierson v. Ray*, 386 U.S. 547 (1967).

In declaring that the "any person" of Section 1983 really meant "any person but us judges," the Pierson court laid waste to an array of established canons of statutory construction, including the plain meaning rule, *see, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (collecting cases), reliance on legislative history if the statute is unclear, and the principle that remedial statutes are liberally construed, **a rule that the Court relied upon literally one day earlier** (in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967)).

These days, lower courts routinely write *designer law*, applying to one and only one set of litigants, with the ultimate goal of extinguishing meritorious *pro se* cases. Appellate courts are willing accomplices in this charade, as some assign a case to a panel and curtly dispose of it the same day. *See, Docket, Harrington v. Wilson*, No. 06-1416 (10th Cir. Jun. 7, 2007)(unpublished) (withdrawn) (assigned, decided, and screwed up royally in a single day).

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[4] A broader version of the Amendment, corresponding to the illegitimate judicially-created one this Court observes today, was introduced by Rep. Theodore Sedgwick (MA), and rejected. Stevens, Two Questions at 824.

III. THE MODERN DOCTRINE OF SOVEREIGN IMMUNITY IS A CLASSIC CASE OF JUDICIAL LAWMAKING.

Smith proceeds under the presumption that there is one and only one correct way to interpret the Constitution. The most effective summation of this comes, as it always seems to, from the pen of Thomas Jefferson:

> Our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction. If [public officials' powers are boundless] then we have no constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives.

Thomas Jefferson, Letter (to Wilson Nicholas), Sept. 7, 1803 at 2. To put it simply, ***either the Constitution is dead, or our Republic is.*** As Justice Scalia adroitly put it, "the Constitution that I interpret and apply is not living but dead — or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted." Antonin Scalia, God's Justice and Ours, *First Things* (May, 2002) at 17.

Our Constitution can be summarized in a single phrase: "Do to others what you would have them

do to you." Matt. 7:12 (NIV). Democracies always failed because eventually, the strong would overwhelm the weak. The republic arms the weakest with the shield and sword of the law, so that they might withstand the onslaughts to come.

They declared that the purpose of government was to secure our individual God-given rights, and that whenever government becomes destructive to these ends, it should be abolished. Declaration Of Independence ¶ 2. And surely, there is nothing more destructive to such ends than a government that cannot be held to account by the individual citizen.

A. The Framers' Understanding of Sovereign Immunity Was Radically Different Than the Modern Iteration.

As Justice Scalia observed, domestic sovereign immunity was not part of the English common law known to the Framers. Antonin Scalia, "*Historical Anomalies in Administrative Law,*" Supreme Court Historical Soc'y. (1985). It may be more accurate to say that their concept of it was so different, we wouldn't recognize it as such.

Let us assume, *arguendo*, that World War II had been fought to a draw, and Joseph Mengele was not forced to flee from victors' justice. As his acts were those of the German government and, pre-

sumptively legal at the time, he would be immune from criminal prosecution. But were he to be sued in tort by a German soldier who was injected with mind-altering drugs against his will, or the woman he subjected to forced sterilization, one can only imagine the collective outrage the world would express, were he (and, the German government) able to hide behind the cloak of immunity.

These incidents actually happened, but not in post-war Germany. **They happened right here at home.** James Stanley, a master sergeant in the Army stationed at Fort Knox, was secretly administered doses of LSD, pursuant to an Army scheme to study its effects on humans. *United States v. Stanley*, 483 U.S. 669, 671 (1987). Linda Sparkman was sterilized without her consent or semblance of medical necessity, pursuant to an order from an Indiana Circuit Court judge. *Stump v. Sparkman*, 435 U.S. 349 (1978). In both instances, perpetrators of obvious crimes against humanity were allowed to take shelter behind a cloak of immunity.

B. Outcomes Under the Competing Theories of Sovereign Immunity

There are three basic forms of sovereign immunity from which the Framers could have selected. But they had to answer to a literate and uncommonly well-informed electorate, whose approval they needed to secure to give birth to their new

Republic. As such, this Court should not be asking what the Framers intended but rather, what their audience would have accepted. According to James Madison, the Stanley hypothetical was what the people were concerned with. 1 *Annals of Congress* 450 (Jun. 7, 1789) (statement of Rep. Madison) (people wanted traditional safeguards against abuse of power by the magistracy). Thus, it all comes down to a simple question: given the three choices, which approach toward immunity would the Framers have chosen?

1. Common Law Sovereign Immunity

Magna Carta established that the King was not a person but an office, one to be administered for the public good. Of course, he was a 'sovereign' and accordingly, nominally entitled to sovereign immunity, but if he wrongfully injured a subject in maladministration of that office, the barons were entitled to "distrain and distress [the King and his family] in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit." *Magna Carta* c. 61 (1215). In essence, while the King had "sovereign immunity," he only enjoyed it when doing something he was authorized by law to do.

Even a cursory review of English law at the time of the Revolution reveals that sovereign immunity

was a mere legal fiction. While the King could not be sued without his consent, he always consented when justice demanded it. *Marbury v. Madison*, 5 U.S. at 163. This permitted Blackstone to state with confidence that "it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* (citation omitted).

Under the common law, King Barack could do no wrong. However, he waived his immunity as a matter of course, and Sgt. Stanley would never be left without proper redress. Whereas 'the consent of the King' took shape through hundreds of years of custom and tradition, *see*, James Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 Nw. U.L. Rev. 899, 906-26 (1997), the Bill of Rights serves as an express and unequivocal waiver of immunity. It tells King Barack's officers that there are certain things they may not do. Hence, it is fair to conclude that they would have accepted this view of sovereignty.

2. Popular Sovereignty

In his influential *Commentaries*, Professor (Justice) Story explained what is historically the better view: popular sovereignty, wherein the sovereign people comprising the "State" divided its powers "among various functionaries, and each in the

limited sense would be sovereign in respect to the powers, confided to each; and dependent in all other cases. Strictly speaking, in our republican forms of government, the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state." 2 Joseph Story, *Commentaries On the Constitution of the United States* § 208 (1836).

Under this view, the people are the sovereign, whether it is here, in England, or Burkina Faso, and government is an agent of the people. Under this paradigm, when individual agents act outside the bounds of their agency, they enjoy no protection as the sovereign when they do.[5] Accordingly, the outcome is identical to that reached at common law, without the legal fiction of consent.

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[5] Blackstone explained the danger inherent in parliamentary sovereignty, 1 Blackstone, *Commentaries* at 157; the "American solution" was to repudiate it entirely, *see e.g.*, Thomas Jefferson, *A Summary View of the Rights of British America* (1774), reasoning that sovereignty resided in the people (who held it as tenants-in-common), and therefore, was impossible to delegate. See e.g., *Proclamation of the General Court* (Mass. 1776). It was incorporated in colonial constitutions, as well. *E.g.*, *Virginia Declaration of Rights* (Va. 1776); Mass. Const. (1780), Part I, art. V.).

3. "Saddam Hussein Immunity"

In recent years, a threadbare majority of this Court has read sovereign immunity in the Saddam Hussein sense, concluding that, because he was (they were) elected President of Iraq (appointed to the federal bench), any act he (they) takes is "an act of the people of Iraq" (the United States), heedless of whether the act in question was within the scope of their employment or, even expressly against the law. In essence, they claimed the *jus summi imperii* -- the absolute sovereignty of the despot. *Hans, supra; Stump, supra*. The trial court in Stump had a word for it: "tyranny." *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977).

This is the vision of "federalism," in the mind of Saddam Hussein, Justice Kennedy, and the Great Stalin: While every State is "bound" by the Constitution, the only cord which "binds" them is their own "good faith":

> The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. **The good faith of the States** thus **provides an important assurance** that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

Alden v. Maine, 527 U.S. 706, 755 (1999) (emphasis added). Truly, a more elastic cord never has been devised. And to these honorable gentlemen, only three words need be offered in rebuttal:

"ARBEIT MACHT FREI"

When you stroll through the gates of Dachau on your way to the ovens, you are assaulted by that slogan, reminding you of the inherent *goodness* of Man. That five Justices would sign off on such a stultifying statement staggers the imagination. And that Clarence Thomas, descendant of slaves, would knowingly ascribe to it, eclipses all possible concepts of self-satire.

James Stanley was a soldier: a man who swore

to fight and die to defend a document so feeble, it could not even protect him from crimes against humanity. In turn, this begs the dispositive question in this case: **Would any sane human being, acting with knowledge that the Constitution had cloaked the new government in a impermeable shield of sovereign and judicial immunity, so "their betters" in Philadelphia could arbitrarily deprive them of their God-given rights at any time with absolute impunity, willingly consent to that arrangement?** To even state the case for the *Alden* line of cases is to refute it.

As Justice Stevens has pointed out, sovereign immunity is fundamentally unjust, as it empowers the State to deprive its citizens of their "rights" with absolute impunity. Stevens, *Two Questions* at 827-28. It has further been abolished as a matter of *jus cogens* international law. International Covenant on Civil and Political Rights ("ICCPR") art. 2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992) (signatory State must provide an effective remedy for rights violations committed by those acting in an official capacity); *see e.g., Maharaj v Attorney-General of Trinidad & Tobago (No. 2)*, A.C. 385 (1979) (rule throughout the Commonwealth); Case C-224/01, *Köbler v Austrian Republic*, 3 CMLR 28 (2003) (rule for European Union). Moreover, as Defendant United States is a signatory to the ICCPR, the Constitution declares that valid treaties are the Law of

the Land, U.S. Const. art. VI, cl. 2; *Head Money Cases*, 112 U.S. 580, 598-99 (1884), unilateral reservations which are fundamentally incompatible with the object and purpose of a treaty are void under international law, *see, Vienna Convention on the Law of Treaties*, art. 19, 1155 U.N.T.S. 331 (entered into force, Jan. 27, 1980); and "an act of congress ought never be construed to violate the law of nations, if any other possible construction remains," *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quotation omitted), it is hard to imagine any form of legitimate judicial alchemy that could deprive this treaty of legal force.

If this Court's duty is to give life to the intent of the Framers, it has little choice but to abandon its previous decisions. *Stare decisis* is not a straightjacket, but a corset. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 855 (1992). As this Court has laid waste to a healthy cache of precedents, *e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986); *Stanford v. Kentucky*, 492 U.S. 361 (1989), on the basis of perceived "errors," this Court ought to take the opportunity to inter a doctrine that has produced nothing but manifest injustice. **You owe that to the memory of James Stanley.**

CONCLUSION

What is the Constitution, but the great contract of the people? Judge Roane asked that question in *Kamper*, 3 Va. at 59, and it is just as fair to ask it today. Stripped of the mysticism and patriotism, it is a series of adhesion contracts, creating express and limited agencies, and colloquially described as "citizenship" and "statehood."

Under the terms of this contract, citizens agree to pay taxes, to obey the laws, and to fight and even lay down our lives, if necessary, to preserve the Republic. We citizens don't ask that much in return, but what we do ask, we have the right to demand. According to Justice Alito, we have a right to **DEMAND** "evenhanded enforcement of the law." *Ricci v. DeStefano*, No. 07-1428, 557 U.S. ___ (2009) (Alito, J., concurring; slip op., at 13). Or, in the elegant prose of Chief Justice Marshall, the right to claim the protection of the laws whenever he receives an injury. **Smith DEMANDS the same Fourteenth Amendment Hugh Caperton got, the same *Rooker-Feldman* doctrine Exxon-Mobil got, and the same Equal Protection Clause Frank Ricci got.**

That justices of the Colorado Supreme Court committed a tort and federal felony (specifically, honest services mail fraud) against Smith cannot reasonably be disputed, as every fact necessary

to prove that claim has been judicially noticed. The only question is whether this Court will treat it as the unauthorized abuse of power that it is, or require the General Government to ratify the act and compensate Smith for the ensuing harm. **To do nothing is to sign our Republic's death certificate.** Accordingly, this Court should grant a writ of certiorari, to resolve the issues of broad significance raised by this petition.

Respectfully submitted,

__/s/_____
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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,958 words,[6] excluding parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (Century Gothic).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2010.

_/s/_____
Kenneth L. Smith, *in propria persona*

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[6] This tally includes the 29 words in the cartoon and photograph and 37, in the statement of jurisdiction.